

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

HOWARD W., WENDY W., and  
KATHRYN H.-W.,

Plaintiffs,

v.

PROVIDENCE HEALTH PLAN, and the  
SWEDISH HEALTH SERVICES  
EMPLOYEE BENEFITS PLAN, 519,

Defendants.

CASE NO. 2:21-CV-01346-JHC

ORDER RE: SUPPLEMENTAL BRIEFING


In this case, Plaintiffs Howard W., Wendy W., and Kathryn H.-W. bring two causes of action: (1) a claim for recovery of benefits under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132(a)(1)(B); and (2) a claim under the Mental Health Parity and Addiction Equity Act of 2008, 29 U.S.C. § 1185a. Dkt. # 2 at ¶¶ 55–73. Plaintiffs and Defendants Providence Health Plan (“PHP”) and the Swedish Health Services Employee Benefits Plan, 519 (“Plan”) have cross-moved for summary judgment on both claims. Dkts. ## 44, 51. For the ERISA cause of action, Defendants say that the Court should apply the abuse of discretion standard of review based on a provision in the Plan granting PHP discretion to determine eligibility for medical claims. Dkt. # 44 at 20–21. Plaintiffs concede that abuse of

1 discretion applies. Dkt. # 51 at 38. But the Court has identified a basis to apply the de novo  
2 standard of review.

3 State regulations may alter the standard of review in ERISA cases. *See Rush Prudential*  
4 *HMO, Inc. v. Moran*, 536 U.S. 355, 384–86 (2002). Washington regulatory law provides that in  
5 the health care service context, “[n]o contract may contain a discretionary clause.” WAC 284-  
6 44-015; WAC 284-44-010. A “discretionary clause” includes any provision that results in “the  
7 standard of review of a carrier’s interpretation of the contract or claim decision [being] other  
8 than a de novo review.” WAC 284-44-015. And ERISA provides that state laws regulating  
9 insurance are exempt from preemption. *See* 29 U.S.C. § 1144(b)(2)(A). The Ninth Circuit has  
10 not yet decided how this regulation applies in ERISA cases, but one district court found that it  
11 “clearly prohibits discretionary clauses in the health care services context.” *Osborn by &*  
12 *through Petit v. Metro. Life. Ins. Co.*, 160 F. Supp. 3d 1238, 1246 (D. Or. 2016). Several courts  
13 have also held that ERISA does not preempt a nearly identical regulation voiding discretionary  
14 clauses in disability insurance policies, making de novo review mandatory for such policies. *See*  
15 *Murray v. Anderson Bjornstad Kane Jacobs, Inc.*, No. C10-484 RSL, 2011 WL 617384, at \*3  
16 (W.D. Wash. Feb. 10, 2011); *Landree v. Prudential Ins. Co. of Am.*, 833 F. Supp. 2d 1266, 1274  
17 (W.D. Wash. 2011). It appears to the Court that WAC 284-44-015 may apply to the Plan here,  
18 which provides health care benefits.

19 Because this issue has not been raised by either party, the Court directs them to each  
20 submit a supplemental brief addressing the issue within 10 days of this Order. Each brief should  
21 be no more than six pages in length.

1 Dated this 17th day of October, 2022.

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4 John H. Chun  
United States District Judge